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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

EVARISTO RIOS, TERRI POLAK, AND EVE )  
HERBST, )

Plaintiffs, )

v. )

ANGEL LEBRON, Commissioner of )  
Conservation and Cultural Affairs; )  
JOSEPH SUTTON, Deputy Chief of )  
Conservation and Cultural Affairs; )  
GEORGE FARRELLY, Commissioner of )  
Public Safety; JUAN LUIS, Governor )  
of the Virgin Islands, )

Defendants. )

Civ. No. 85-280

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**APPEARANCES :**

**Clive Rivers, Esq.**

St. Thomas, U.S.V.I.

*For the plaintiff Evaristo Rios,*

**Kenth Rogers**

St. Thomas, U.S.V.I.

*For the plaintiff Terri Polak and proposed intervenor-  
plaintiffs.*

**Denise George-Counts, Esq.**

**Kerry Drue, Esq.**

St. Thomas, U.S.V.I.

*For the defendants,*

**Chad Messier, Esq.**

St. Thomas, U.S.V.I.

*For the proposed defendant-intervenors.*

**MEMORANDUM**

Moore, J.

The plaintiffs in this case are itinerant vendors who for

many years were permitted to conduct their vending businesses in the parking area on the scenic overlook across from Drake's Seat above Magen's Bay in St. Thomas. They seek to permanently enjoin the government from removing them from the Drake's Seat location.

## **BACKGROUND**

### **A. Proceedings in 1985**

In 1985, plaintiffs Evaristo Rios and Terri Polak filed this case seeking to enjoin the defendants Angel Lebron, then-Commissioner of Conservation and Cultural Affairs, Joseph Sutton, then-Deputy Chief of Conservation and Cultural Affairs, George Farrelly, then-Commissioner of Public Safety, and Juan Luis, then-Governor of the Virgin Islands, from prohibiting the plaintiffs from operating their vending businesses at the Drake's Seat site. The plaintiffs alleged that the defendants had revoked the vendors' location permits without notice and an opportunity for a hearing, and that this action violated the Due Process Clause of the Fourteenth Amendment. (See Compl. ¶¶ 21-22.) At the time, the plaintiffs held business licenses issued by the Department of Consumer Affairs and based on police permits authorizing them to sell their goods at that location.

After having granted the plaintiffs' motion for a temporary restraining order on July 23, 1985, the Court held a hearing on the merits of the plaintiffs' request for injunctive relief. At

the hearing, District Judge David O'Brien found that the plaintiffs were "itinerant vendors" whose goods traveled with them and ruled that "the provisions of Title 23, section 92, of the Virgin Islands Code, which require[d] a police permit,<sup>[1]</sup> together with a license to do business issued by Consumer Affairs, constitute[d] the necessary procedures for itinerant vendors to properly conduct their businesses at the location across from the Drake Seat site." On September 17, 1985, the Court entered an order *nunc pro tunc* to July 25, 1985, memorializing its findings, concluding "[t]hat a permit, once having been granted by the Department of Public Safety for whatever period of time, cannot be revoked without due process of law," and ordering that the "plaintiffs are granted a preliminary injunction barring the Department of Conservation and Cultural Affairs from denying plaintiffs the right to conduct their businesses at the location across from the Drake Seat site pursuant to valid permits issued to them by the Department of Public Safety." (See Order Granting Prelim. Injunct. at 2-3 (O'Brien, J.).) The preliminary injunction was never made permanent nor was there any further activity in this case until recently.

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<sup>1</sup> The licensing of businesses and occupations is currently governed by 27 V.I.C. §§ 301-304.

## **B. Recent Proceedings**

Sometime in 1993, the Department of Public Safety ["Public Safety"] ceased issuing permits to the vendors, apparently due to safety considerations. (See Def.'s Ex. O (admitted into evidence at January 24, 2001 hearing).) Instead, the plaintiffs each entered into what is titled "Memorandum of Agreement" ["MOA"] with the Department of Housing, Parks, and Recreation ["Housing"]. These MOAs purport to be month-to-month agreements between Housing and the individual vendors allowing the vendor to set up his or her vending business across from the Drake's Seat site. By the terms of the agreements, each vendor pays \$75.00 per month, for a total of \$900.00 per year, for the right granted by the MOA. Since that time, the Department of Licensing and Consumer Affairs ["Licensing"] has regularly accepted these MOAs as satisfying one of the prerequisites of a vendor's license, which is a valid placement permit. See V.I. CODE ANN. tit. 27, § 302(e). This practice seems to have followed a tacit understanding among the various departments involved.

On June 9, 2000, Mr. Ira Hobson, Commissioner of Housing, gave the vendors thirty days' notice that Housing would not issue any more MOAs to these vendors. The vendors objected strenuously, and the government granted them two extensions of time. After continued resistance, the vendors were ultimately removed from the site on December 1, 2000. After their removal,

the Commissioner of Housing agreed to hear the vendors' concerns at an informal meeting held on December 12, 2000.<sup>2</sup> Still not satisfied, the plaintiffs invoked the preliminary injunction entered in 1985 by Judge O'Brien, claiming that the government had deprived them of a protected property interest without due process and asking the Court to order the successors-in-interest to the officials enjoined in 1985 to appear and show cause why they should not be held in contempt. They also belatedly moved to make the preliminary injunction permanent. These proceedings ensued.

After lengthy hearings on the matter, the Court ruled at the conclusion of the hearing on January 26, 2001, that the vendors no longer possess a legitimate property interest to which the 1985 preliminary injunction would apply. The Court suspended the preliminary injunction, as it was based upon the existence of a protected property interest, namely, Public Safety's placement permits. The Court deferred final ruling, however, and the plaintiffs were given additional time to file a supplemental brief that would establish authority for the Court to find a legitimate property interest absent the placement permit. Because the plaintiffs have failed to establish any authority for

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<sup>2</sup> According to Commissioner Rutnik, the vendors' business licenses were not revoked by the Department of Licensing upon the termination of the MOAs. The vendors were given an opportunity to obtain valid placement permits for different locations to satisfy that prerequisite for itinerant vendors' business licenses, which opportunity they refused.

holding otherwise, the Court will dissolve the preliminary injunction. It necessarily follows that the vendors were properly removed from Drake's Seat.

### **DISCUSSION**

The Revised Organic Act of 1954 ["Revised Organic Act"] operates as the territorial constitution for the governance of the United States Virgin Islands.<sup>3</sup> The Revised Organic Act established three branches of government – a legislative, a judicial, and an executive branch – and defined their respective powers and duties. The Legislature of the Virgin Islands was vested with, among other things, the power to enact new laws not inconsistent with the Revised Organic Act. See REV. ORG. ACT § 8(c), 48 U.S.C. § 1574(c). In exercising that power, the Legislature created various administrative agencies and departments, vesting them with very specific statutory powers and duties.

In order to determine the authorized powers of a particular agency or department, the Court must look to the act creating the agency. For example, the act establishing the Department of Licensing and Consumer Affairs and setting forth its duties and

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<sup>3</sup> The complete Revised Organic Act of 1954 is located at 48 U.S.C. §§ 1541-1645 (1995 & Supp. 2000), reprinted in V.I. CODE ANN. 73-177, Historical Documents (1995 & Supp. 2000) [hereinafter "REV. ORG. ACT"] (preceding title 1 of Virgin Islands Code).

powers is codified at 3 V.I.C. §§ 270-276. In general, "[t]he Department . . . shall establish, administer, coordinate and supervise the regulation and licensing of private business and professions." 3 V.I.C. § 271. Section 272(b) then sets forth the specific authority of the Department of Licensing, which includes approving and amending rules, regulations, orders, and determinations necessary for compliance with the statute.

3 V.I.C. § 272(b).

According to Licensing's duly enacted rules and regulations, "no person shall sell goods, or transact business from a fixed location or general area upon or adjunct to public streets, sidewalks, grounds, or designated vendors plazas without a placement permit duly issued by the Commissioner of Police or the Commissioner of Licensing and Consumer Affairs." 3 V.I. R. & REGS. ch. 16, § 272-3 (1992) (emphasis added). A "placement permit" is defined as "[a] document issued by the Police Department authorizing an individual licensed as an itinerant vendor to conduct his business from a designated fixed location, and in accordance with the terms and conditions thereof." *Id.* § 272-2. A person applying for a business license who does not have a fixed place of business must have a valid placement permit in order to be granted a license. See 27 V.I.C. § 302(e).

By definition, the MOAs entered into by Housing and the plaintiffs are not "placement permits" as that term is defined by

Virgin Islands law. The Virgin Islands Legislature vested in Public Safety the exclusive<sup>4</sup> authority to issue placement permits to persons seeking to set up their vending businesses at any given location. See 23 V.I.C. § 92 ("No person shall sell goods, or transact similar business upon public highways or grounds, other than the regular market places, without the permission of the police authorities."); 27 V.I.C. §§ 301, 302(e), 303; see also 3 V.I. R. & REGS. ch. 16, §§ 272-2 to 272-3; 23 *id.* ch. 3, § 341. Housing, on the other hand, was established to "exercise general control over the enforcement and administration of the laws pertaining to public housing, recreation, and parks." 3 V.I.C. § 302. Nowhere in the act establishing the Department of Housing is there any mention of the power to issue permits or licenses of any kind, or the power to enter into an agreement with an itinerant vendor that would serve the same function as the statutorily required placement permit. Furthermore, Licensing is not authorized to issue a business license to an itinerant vendor based on a "memorandum of agreement" from Housing.

Both Housing and Licensing have exceeded their respective statutory authority by issuing and accepting these MOAs to satisfy the statutory requirement for a placement permit. A

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<sup>4</sup> The Court can find no statutory authority for the suggestion in 3 V.I. R. & REGS. § 272-3 that Licensing can issue a placement permit, nor have the parties identified any authority.

vendor with an MOA instead of a placement permit has nothing more than an *ultra vires* agreement issued by one department that has been accepted previously, without authorization of law, by another. Thus, when Housing terminated the MOAs, it did not revoke a "valid permit issued by the Department of Safety" without notice and a hearing, which is what the injunction bars. Instead, it terminated an unauthorized, illegal, *ultra vires* agreement. Because the vendors do not possess valid placement permits, the question becomes whether this unauthorized, *ultra vires* MOA from Housing can nevertheless be a property interest protected by the Fourteenth Amendment or this Court's earlier preliminary injunction.

The Fourteenth Amendment prohibits government deprivations of property without due process of law. See U.S. CONST. amend XIV § 1, cl. 2. To apply this prohibition, the Court must determine at the outset whether the plaintiffs' asserted interest is a legitimate property interest. See *Matthews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893 (1976) (setting forth the factors to be considered); *Sullivan v. Barnett*, 139 F.3d 158, 174-79 (3d Cir. 1998) (applying *Eldridge* factors).

To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it. . . . Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as [territorial] law.

*Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). An *ultra vires* contract with the government does not and cannot create a legitimate property interest. See, e.g., *Lynch v. Borough of Ambler*, 1996 U.S. Dist. 7183, at \*32-36 (E.D. Pa. May 29, 1996) (any purported contract made without statutory authorization would be *ultra vires* and thus not a legitimate property interest); *Mele v. Fahy*, 579 F. Supp. 1576, 1582 (D.N.J. 1984) (concluding that the *ultra vires* contract between a municipality and the plaintiff was "of no effect," so there was no property interest to protect); *Mahoney v. Philadelphia Housing Auth.*, 320 A.2d 459, 460-61 (1974) (holding that an *ultra vires* grant of tenure could not create a legitimate property interest).

The plaintiffs cannot assert that agents acting on behalf of Licensing and Housing, although acting without actual authority, nevertheless bound the government to give a person holding an MOA the same right as a person holding a valid placement permit. In a case arising in the Virgin Islands, the Court of Appeals for the Third Circuit has ruled that

[i]t is well settled that contracts with agents of the Government must be in strict conformity with the authority conferred. The Government is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.

*In the Matter of the Estate of Hooper*, 5 V.I. 518, 533, 359 F.2d

569, 577 (3d Cir. 1966) (citations omitted). In the words of the United States Supreme Court,

[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

*Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 384, 68 S. Ct. 1, 3-4 (1947), *quoted in Estate of Hooper*, 5 V.I. at 534, 359 F.2d at 578. Thus, the vendors may not rely on a theory of apparent authority to bind the government to the terms of the Memorandum of Agreement or, for that matter, to bring the MOA within the scope of protections afforded to persons holding placement permits. See 27 V.I. § 288; V.I. R. & REGS. ch. 16, § 272-19; *id.* ch. 3, § 341.

The plaintiffs have not advanced any argument or legal authority that would allow the Court to find that these unauthorized MOAs nonetheless constitute legitimate property interests that can trigger the protections of procedural due process. Instead, the plaintiffs continue to assert their "rights" under the preliminary injunction. Many of the Drake's Seat vendors seem adamantly convinced that they have an absolute right to sell their goods from the Drake's Seat site forever. There simply is no basis in law or equity for this belief, nor

did the Court's preliminary injunction guarantee their right to vend from that specific place. All the preliminary injunction provided was the right to due process, that is, to notice and a hearing, before the government could cancel an itinerant vendor's right to operate at Drake's Seat. This important, but limited, right to notice and hearing depended upon the vendors holding valid placement permits issued by Public Safety, which gave them constitutionally protected property rights. Because the vendors no longer hold valid placement permits from Public Safety, they no longer have such property interests. Therefore, the government was bound by neither the preliminary injunction nor the Constitution to afford notice and a hearing before removing the vendors from Drake's Seat.

### **CONCLUSION**

For the reasons stated, the Court will dissolve the preliminary injunction and uphold the removal of the vendors from Drake's Seat.\*

**ENTERED** this 12th day of April, 2001.

\* This Memorandum and attached Order shall be served separately on Ms. Terry Polak and the proposed intervenor-plaintiffs who were previously represented by Mr. Kenth Rogers. The Court has been served with an order from the Department of Licensing and Consumer Affairs dated March 13, 2001, revoking Mr. Rogers' business license and ordering that he cease the practice of law in the Virgin Islands.

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FOR THE COURT:

\_\_\_\_\_/s/\_\_\_\_\_  
Thomas K. Moore  
District Judge

ATTEST:  
WILFREDO F. MORALES  
Clerk of the Court

By: \_\_\_\_\_  
Deputy Clerk

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**Denise George-Counts, Esq.**

**Kerry Drue, Esq.**

St. Thomas, U.S.V.I.

*For the defendants,*

**Chad Messier, Esq.**

St. Thomas, U.S.V.I.

*For the proposed defendant-intervenors.*

**ORDER**

For the reasons set forth in the accompanying memorandum of  
even date, it is hereby

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**ORDERED** that the preliminary injunction entered by this Court on July 25, 1985 (Docket No. 16), is **DISSOLVED**. The Clerk is directed to close the file for the above-captioned case.

**ENTERED** this 12th day of April, 2001.

**FOR THE COURT:**

\_\_\_\_\_/s/\_\_\_\_\_  
**Thomas K. Moore**  
**District Judge**

**ATTEST:**  
**WILFREDO F. MORALES**  
**Clerk of the Court**

**By:** \_\_\_\_\_  
**Deputy Clerk**

**Copies to:**  
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